STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc.	)	
vs.	)	
Illinois Bell Telephone Company, d/b/a SBC Illinois	)	Docket No. 05-0156 (consolidated with 05-0154 and 05-0174)
In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515,	)	

REPLY OF XO AND ALLEGIANCE TO SBC'S PETITION FOR REVIEW

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XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. herby file their response to the Petition for Review of the Administrative Law Judge's Decision ("ALJ Decision) of SBC Illinois ("SBC").

I. INTRODUCTION

The Commission must cut through the hysteria of SBC's pleading and its insults to the Administrative Law Judge and consider the essence of SBC's argument: SBC claims that because it only threatened to cut off service to CLECs but never carried through with its threat, it cannot be subject to an adverse finding under Section 13-514 of the Illinois Public Utilities Act ("PUA"). Nonsense. SBC's threat was real, it had serious implications and it was imminent when XO and Allegiance filed the complaint that initiated their proceeding. The fact that SBC never carried out its threat had far more to do with this Commission's emergency order than any self-restraint of SBC.

SBC is rewriting history when it claims that there was no need for this proceeding. Up until the day they filed their complaint, XO and Allegiance were in

regular contact with SBC on its plans to implement its threatening Accessible letters. Correspondence between them demonstrates that this case *was* necessary to prevent SBC from carrying out its threat.

The ALJ Decision places this Commission squarely in the mainstream of state regulatory decisions implementing the *TRRO*. That order is a thoughtful review of all of the evidence and arguments presented by the parties, resulting in a balanced and inevitable decision. More importantly, it is virtually **required** by the finding of Judge Gottschall of the United States District Court, Northern District of Illinois, who rejected SBC's claim that the *TRRO* is self-effectuating, finding that paragraph 233 of the *TRRO* strongly implies that "the FCC envisioned negotiations as a predicate to implementation of the *TRO Remand Order's* requirements."[1] The ALJ Decision is also consistent with this Commission's Amended Emergency Order, which found that "the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution."[2]

Furthermore, this is not a situation where SBC is being penalized for advocating a legitimately held opinion. Rather, SBC took a few snippets out of context from the *TRRO* and used them as an excuse to force its view of the order upon CLECs. The ALJ Decision penalizes SBC for its deliberate overreaching.

In summary, the ALJ Decision was correct in finding that SBC violated its obligations under Section 13-801 of the PUA, Section 271 of the federal Act, its interconnection agreements with XO and Allegiance and the FCC's *TRRO.*

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[1] *Illinois Bell Telephone Company v. Hurley et al*. Cause No. 5 – C - 1149 Memorandum and Opinion Order, March 29, 2005.

[2] *Amendatory Order by the Commission*, March 23, 2005,at 8.

II. SBC IS ATTEMPTING TO REWRITE HISTORY.

SBC claims that it did not violate Section 13-801 or this Commission's order in Docket 01-0614 approving SBC's tariff filed to conform with that section of the PUA because it never really did anything. SBC argues that it only issued "words" and took no actions[3]. Moreover, SBC claims that on the eve of the filing of the complaints initiating this proceeding, it made a commitment not to implement its Accessible letters in Illinois, so again, it did no wrong.

First, the Commission should not be impressed that SBC has yet to refuse any CLEC orders or implement its other threats made in its Accessible Letters. (SBC's primary means of notifying CLECs regarding network, billing, ordering and service changes). SBC took no such actions because this Commission ordered it to take no such actions. SBC's claim that it should walk away without a finding of a violation of the PUA is no more compelling than a convicted burglar at a sentencing hearing asking for mercy because he didn't commit any burglaries while in jail awaiting trial.

SBC's plea for mercy is based on a misrepresentation of the sequence of events that led up to the Commission's emergency order in this proceeding. On February 11, 2005, SBC issued its Accessible letters with its threat to stop processing orders for unbundled elements that SBC believed the TRRO relieved it from offering. On February 18, 2005, XO and Allegiance wrote letters to SBC requesting negotiations to implement the *TRRO*, negotiations required by paragraph 233 of the *TRRO*. (XO/Allegiance Ex. 4.0, sub-ex. B) SBC's response, in a letter dated February 24, 2005, was to reiterate its intentions: "Please note that, notwithstanding your ICA(s), orders received for elements

[3] "They are simply the *words* in SBC's 13-state 'Accessible Letters' and the beliefs that those words express." SBC Petition for Review at 10 (emphasis in original).

that have been declassified through a finding of non-impairment by the TRO Remand Order will not be accepted, beginning March 11, 2005, as clearly outlined in Accessible Letters CLECALL05-017 and CLECALL05-019." (XO/Allegiance Ex. 4.0 sub-ex. D). To make certain SBC's threat was understood, the above quoted language was typed in bold. XO and Allegiance then sent SBC a 48-hour letter, spelling out the ways in which SBC's threatened actions violated Section 13-514 of the PUA. (XO/Allegiance Ex. 4.0 sub-ex. E). SBC's again refuse to back down from its threat. SBC's response to the 48-hour letter stated:

> SBC Illinois fully intends to comply with the FCC TRO Remand Order and stop accepting new orders for mass market Unbundled Local Circuit Switching/UNE-P, Unbundled High-Capacity Loops and Unbundled Dedicated Transport pursuant to the impairment conclusions reached by the FCC.
>
> XO/Allegiance Ex. 4.0 sub-ex. F.

While SBC's response to the 48 hour letter paid lip service to a willingness to negotiate changes to its interconnections agreements, SBC insisted on the March 11 cut-off date, stating: "In other words, the requirement to amend interconnection agreements does not in any way delay the effectiveness of the FCC's clear direction that CLECs are not to submit, and ILECs are not to process, orders for new UNEs beginning March 11, 2005." *Id.*

Finally, in its response to the 48 hour letter, SBC dug in its heals on its desire to implement its decision on which high capacity loops and dedicated transport were no longer impaired by declaring that the list to the FCC was presumptively valid and that "it would be extraordinarily difficult for XO to certify that, after completing a reasonably diligent inquiry, orders for such high capacity loops and dedicated transport are

consistent with the Commission's unbundling criteria in such wire centers and on such routes." *Id.*

That is the context in which this proceeding was brought. SBC pigheadedly insisted on forcing its view of the *TRRO* on CLECs, without the negotiations required by both the *TRRO* and its interconnection agreements. These were not idle "words." To take a phrase from SBC's motion, they were SBC's "solemn commitment" to unilaterally implement SBC's vision of the *TRRO.* Contrary to SBC's unilateral approach, XO and Allegiance acted diligently and attempted to abide by the federal Act by negotiating an amendment to their interconnection agreement to reflect the TRRO.

SBC also tries to argue that this case was unnecessary because it promised in a supplement to its response to the 48-hour letter, to abide by its Section 13-801 obligations with regard to unbundled local switching and UNE-P until the federal district court for the Northern District of Illinois ruled that the FCC has preempted that section of the PUA. SBC Petition for Review at 2-3. XO and Allegiance will let the other CLECs in this consolidated case address SBC's claim with regard to switching and UNE-P. But that promise had no effect on the issues raised by XO and Allegiance in this proceeding – high capacity loops and dedicated transport. At no time has SBC promised to continue to provide those unbundled elements until the district court rules. Thus, SBC's promise in its response to the 48-hour letters of XO and Allegiance was meaningless. They were able to continue to order those elements **only** because they initiated this proceeding and obtained the Commission's Emergency Relief Order.

Finally, SBC rewrites history when it tries to blame all of its problems on the Administrative Law Judge ("ALJ"). According to SBC, the initial order of the ALJ was a

radical departure from the rulings in other jurisdictions that only became this Commission's order by operation of law, "forcing the Commission to enter an Amendatory Order to correct its course before the merits phase proceeded any further."[4] Again, SBC is stretching the truth. As the Commissioners are well aware, on March 11, 2005, they deliberated the merits of the order granting emergency relief and **voted** to allow it to stand. Moreover, the subsequent Amendatory Order made a change only on the treatment of switching and UNE-P for new customers, hardly a sweeping indictment of the original order. SBC's claim that the ALJ Decision "tries to reverse course, return to the initial Order's unlawful path . . . and from there to plunge even further"[5] is pure hyperbole. The ALJ Decision is the logical successor to the Amendatory Order affirmatively entered by this Commission. The conclusions are almost identical, with the primary difference being the refinement necessary to address the issue of how to determine if a customer is new or existing.

III. SBC'S ARGUMENTS RELATED TO UNBUNDLED SWITCHING AND UNE-P DO NOT APPLY TO XO AND ALLEGIANCE.

The Commission should be aware that XO and Allegiance only requested relief related to high capacity loops and transport. This creates an important distinction between this docket and Dockets 05-0154 and 05-0174, which also involve switching and UNE-P. SBC's Petition for Review mixes the arguments it makes regarding UNE-P with the distinct issues related to loops transport it is making in this proceeding. While there are many similarities in the issues related to each type of unbundled network element, there are key differences that impacted both the requests for emergency relief and the ultimate resolution of this proceeding. One difference is the one discussed above – SBC

[4] SBC Petition for Review at 2.
[5] *Id.*

only committed to continue taking orders for switching and UNE-P pending the decision of the district court. It has made no similar commitment for loops and transport. The second key difference is that the process set forth by the FCC for the withdrawal of high capacity loops and transport that differs from its treatment of switching and UNE-P. Under the *TRRO*, SBC has absolutely no right to unilaterally terminate high capacity loops and transport. Joint Petitioner can order high capacity loops or transport if they:

> undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge . . . [they are] entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3)."
>
> *TRRO* ¶ 234.

If SBC disagrees with a CLEC's determination, it "can raise that issue through the dispute resolution procedures provided for in its interconnection agreements." Id.

Prior to the filing of this proceeding, SBC had turned that process on its head and filed with the FCC a list of wire centers and routes that it claimed do not meet the FCC's unbundling criteria. The FCC has not issued an order agreeing with SBC's belief. Nevertheless, SBC informed CLECs through its Accessibile Letter CLECALL05-019 that it would refuse all requests for high capacity loops and transport between those wire centers and on those routes. SBC's rationale was stated in its reply to the Joint Petitioners' Emergency Motion. SBC stated there:

> SBC Illinois does not believe it will be possible for any CLEC to make the required "reasonably diligent inquiry" and then to certify that it is entitled to high-capacity dedicated transport between two offices that are on the list SBC submitted to the FCC, or that it is entitled to a high-capacity loop in a wire center that is on the list SBC submitted to the FCC.
>
> SBC Response to Emergency Motion at 6-7.

In other words, SBC believes that any CLEC that disagrees with SBC could not have conducted a reasonably diligent inquiry. Contrary to SBC's wishes, nothing in the *TRRO* requires CLECs to accept SBC's opinion. CLECs are entitled to conduct their own inquiry, and based on that inquiry reach a different conclusion from the one SBC reached. If a CLEC then requests high capacity loop or transport, SBC **must** provision that request. SBC could challenge the CLEC's determination and follow that up with a dispute resolution, but it cannot do what it tried to do in Accessible Letter CLECALL05-019, which is to inform CLECs that

> as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service Requests (LSRs) for affected elements. . . The effect of the TRO Remand Order on New, Migration or Move LSRs for these affected elements is operative notwithstanding interconnection agreements or applicable tariffs.

SBC Accessible Letter CLECALL05-019, Exhibit A to Joint Petitioners' Motion, XO/Allegiance Ex. 4.0 sub-ex. A.

SBC changed its mind and issued yet another Accessible Letter on March 11, 2005 providing language more consistent with paragraph 234 of the *TRRO*, setting forth the procedure for ordering high capacity loops and dedicated transport.[6] That change of heart was too late because the ALJ had already issued the Order Granting Emergency Relief two days earlier. Pursuant to the PUA, that order became the order of the Commission on the same day that SBC changed its mind and decided to follow the *TRRO.* In summary, SBC's expressions of frustration that it did no wrong ring particularly hollow with respect to unbundled high capacity loops and dedicated transport. SBC knowingly issued threats to compromise the service of CLECs and did

[6] Accessible Letter CLECALL 05-039, Ex.4.0, sub-ex. A.

not back down on those threats until after the Commission granted the emergency relief. SBC's corrective actions were thus too little and too late.

IV. SBC'S ACTIONS VIOLATED THE *TRRO*.

A. Paragraph 233 of the *TRRO* Requires Its Implementation Through the Amendment of Interconnection Agreements.

The ALJ Decision, following the lead of the Commission in the Amendatory Emergency Order, correctly finds that paragraph 233 of the TRRO prohibits the unilateral action of SBC. SBC's Petition for Review disputes that finding, based on a few stray words it finds in the *TRRO*. SBC's argument is directly contrary to the most relevant portion of the *TRRO,* paragraph 233, which is entitled: "Implementation of Unbundling Determinations." Paragraph 233 requires that the *TRRO* be implemented through interconnection agreement amendments.

SBC's argument that the TRRO was self-effectuating and allowed SBC's unilateral approach is also inconsistent with the Triennial Review Order (*"TRO"*).[7] In that decision, the FCC acknowledged:

> that many of our decisions in this Order will not be self-executing. Indeed, under the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers[.]"
>
> FCC's *Triennial Review Order* (*"TRO"*), ¶700.

Moreover, in the *TRO,* the FCC explicitly rejected the argument of SBC and other incumbent carriers that it override the Section 252 process and unilaterally modify all interconnection agreements, stating: "Permitting voluntary negotiations for binding

[7] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

interconnection agreements is the very essence of section 251 and section 252." *Id.*, ¶701.

SBC cites to a few decisions in other jurisdictions that on their face, support SBC's position that it can act unilaterally. But this Commission is not in those jurisdictions. It is in the State of Illinois. In this state, Judge Gottschall of the United States District Court, Northern District of Illinois has found that paragraph 233 of the *TRRO* is controlling. Judge Gottschall entered an order denying SBC's request for a preliminary injunction based on SBC's claim that this Commission's order in Docket 01-0614 has been preempted by the *TRRO*. After considering the same arguments SBC has made before this Commission, Judge Gottschall rejected SBC's arguments and found that nothing but negotiations pursuant to Section 252 of the federal Act would meet the requirement of paragraph 233 of the *TRRO* that carriers enter into good faith negotiations.[8] In her opinion, Judge Gottschall cited another SBC case, a Michigan District Court proceeding which found as she did, that paragraph 233 was controlling.[9] Thus, while there may be some split in the federal courts on this issue, the court that matters, the one sitting in Chicago, has ruled against SBC.

B. Embedded Customers Must Be Allowed to Obtain New or Changed Services During the Transition Period.

SBC argues that the ALJ Decision is contrary to the TRRO because it agreed with CLECs that when the FCC directed that embedded customers could continue to receive the UNEs no longer required to be provided, it meant "customers" instead of SBC's

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[8] *Illinois Bell Telephone Company v. Hurley et al*. Cause No. 5 – C - 1149 Memorandum and Opinion Order, March 29, 2005 at 11-12.

[9] *Order Granting Preliminary Injunction, MCIMetro Access Transmission Services LLC v Michigan Bell Tele. Co*., No 05-07785, E D Mich., March 11, 2005.

preferred view that the FCC really meant embedded "lines."[10] The ALJ Decision is the correct one. Attempting to stretch the *TRRO* to fit SBC's desired outcome of that case, the company had issued Accessible Letters that prohibit embedded customers from making any drops, adds or changes involving UNEs that the *TRRO* determined that ILECs need not offer. The ALJ's Decision noted that most other state commissions have found, that when the FCC indicated that embedded customers services should not be disrupted, it meant that they should be able to add or change lines in the necessary course of business during the transition.

The Indiana Regulatory Utility Commission provided a good explanation of the reason for allowing embedded customers to continue to obtain necessary UNEs:

> We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customer, and those customers for which UNE-P has been requested, as of March 1-, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.[11]

The Kansas Corporation Commission noted that the rule adopted by the FCC supports the position of CLECs:

> The Commission agrees with the CLEC Coalition regarding the meaning of "embedded customer base." First, the Commission finds that based on the language of the regulation adopted by the FCC's TRRO that it is the intent of the FCC that the transition period apply to customers, not lines. In the final regulations, the FCC ordered that ILECs are not required to provide access to local circuit switching on an unbundled basis. *47 C.F.R. § 51.319(d)(2)(ii).* However as to the "embedded base of end-user customers," the ILEC must provide such access. *47 C.F.R. §*

[10] SBC Petition for Review at 31.
[11] Order, *Complaint of Indiana Bell Tel. Co.*, Cause No. 42749, at 6 (Ind. URC Mar. 9, 2005) at 4.

> *51.319(d)(2)(iii)*. Consistent with the CLEC Coalition's position, the Commission interprets this language as referring to customers, not lines.[12]

Finally, the Michigan Public Service Commission provided compelling reasons to reject SBC's position:

> . . . The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may well go beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[13]

At page 27 of its Petition for Review, SBC returns to its sob story, stating that its "interpretation was at least reasonable" and it didn't "knowingly" violate the law. However, if SBC had followed the procedure required by its interconnection agreements and in paragraph 233 of the *TRRO*, rather than issuing unilateral demands in its Accessible Letters, it would have presented its viewpoint to CLECs, the issue would have been the subject of negotiations and perhaps dispute resolution.[14] By taking unilateral action, however, SBC necessitated the filing of these proceedings. The ALJ Decision correctly concluded that SBC knowingly violated state and federal laws.

SBC next attacks (at 28-30) the ALJ Decision's conclusion that negotiations are necessary between the parties regarding the interpretation of embedded and non-embedded. In a passage that echoes SBC's general position regarding its Accessible

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[12] *Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order General Investigation to Establish a Successor Standard Agreement*, Docket No. 04-SWBT-763-GIT (Kan. SSC Mar. 10, 2005) at para. 10-11.

[13] *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon*, Case No. U-14447 (citations omitted, emphasis in original) MPSC, March 9, 2005, at 20.

[14] See ALJ Decision at 16.

Letters that no negotiations are necessary – SBC chides the ALJ Decision for alleged delays that may result from the negotiations – even though the ALJ Decision establishes a 28-day negotiation window. The ALJ correctly concluded that SBC is not allowed to unilaterally establish its interpretation of "embedded customers." That conclusion is proper, given as discussed above, SBC's attempt to transform the term embedded customers into embedded lines. Finally (at pages 29-30), in true déjà vu, SBC cites to the intervening law provisions of the complaining CLECs for SBC's proposition that they do not allow the 28-day negotiation window that the ALJ's Decision establishes. However, these are the same provisions that SBC has claimed all along allow SBC to unilaterally implements its interpretation of the TRRO. This Commission, the TRRO and various courts have already rejected that claim. SBC's claim here should be rejected for the same reasons.

V. SBC'S ACTIONS VIOLATED SECTION 13-801.

SBC argues that the Commission's order in Docket 01-0614 did not depart from the federal Act's requirement of a finding of necessary and impair before SBC could be required to provide unbundled network elements for high capacity loops and dedicated transport. Thus, according to SBC, its threat to stop taking orders for high capacity loops and dedicated transport was not a violation of Section 13-801. Of course, a few weeks ago this Commission found in the first phase Remand Order in that Section 13-801 does not require impairment. SBC's response is that it acted on the law that existed at the time and it cannot be held liable for changes in the law after it issued its Accessible Letters. [15]

[15] SBC Petition for Review at 12-13.

SBC's argument misreads the original order in Docket 01-0614. The Commission explicitly stated in that order that Section 13-801 prohibited it from applying a "necessary and impair" standard to **any** unbundled network element:

> Finally, to the extent that Ameritech has argued that Section 251(d)(2) of the federal act requires a state commission to engage in a necessary and impair analysis when dealing with any issue concerning unbundling, the Commission rests on its prior conclusion in the immediately preceding Section of this Order, that this argument is, in reality, an attack on the constitutionality of Section 13-801 and that the Commission is not the appropriate body to whom to make these arguments.

Docket 01-0614 Order at para 82.

The fact that the above discussion took place in the portion of the order addressing a network platform does not change the fact that the Commission read Section 13-801 to eliminate the necessary and impair standard for all network elements. Of course, the Commission did not need to apply that principle to high capacity loops and dedicated transport because, at that time, the FCC had found impairment so the tariffs under review in that docket provided access to them. But that did not give SBC the freedom to run wild and immediately impose the FCC's impairment finding in the *TRRO*, even though Section 13-801 precludes the use of such a finding. Section 13-801 contains no necessary and impair language. When SBC issued its Accessible Letters, it was violating the clear language in that section of the PUA.

The ALJ Decision was also correct to note that the Remand Order in Docket 01-0614 further supports the proposition that there is no necessary and impair test in Illinois for high capacity loops and dedicated transport. That finding is consistent with paragraph 82 of the original order cited above. Until a court or the FCC says otherwise, SBC cannot deny access to high capacity loops and dedicated transport in the State of Illinois

as long as it is subject to the requirements of Section 13-801. That section of the PUA contains no "necessary and impair" language and SBC's attempt to impose such a test was a violation of the PUA.

VI. SBC's ACTIONS VIOLATED ITS OBLIGATIONS UNDER SECTION 271 OF THE FEDERAL ACT.

A. The ALJ's Decision Correctly Invoked Section 271 and the Independent Obligations That Section of the Federal Act Places Upon SBC.

SBC first argues that the ALJ's Decision should not have reached the complainants' Section 271 claims. That claim, however, is directly contrary to federal and state precedent. On the federal level, the Court in USTA II stated:

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§251-252. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching and call-related databases in order to enter the interLATA market.[16]

On the state level, this Commission made the same finding in the recent XO-SBC Arbitration Order, where it held that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis."[17] The ALJ's Decision correctly acknowledges these authorities at page 23.

In its Petition for Review, SBC starts with a series of red herrings regarding what it has allegedly committed to do. What SBC does not acknowledge is the substance and timing of its "commitments". As described above, SBC's "commitments" were either

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[16] *United States Telecom Association v. FCC*, 359 F.3d 554, 588 (DC Cir. 2004)("*USTA II*").

[17] ALJ Decision at 23 (citing *XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket 04-0371, Order, Sept. 9, 2004, at 47).

hollow, as in its unilateral interpretation of embedded lines rather than embedded customers, or untimely, as in "commitments" it made after the Commission issued its Emergency Order in this Docket.[18] Finally, as XO and Allegiance have noted, according to SBC's position there is nothing that stops it from issuing another flurry of "Accessible Letters" that totally redefine SBC's interpretation of its obligations.

Next SBC states its position that "only the FCC has jurisdiction to enforce section 271.[19] In doing so, SBC is really side-stepping the analysis of the Commission Staff that was adopted by the ALJ's Decision. As Staff correctly noted, the CLECs are not asking the Commission to enforce Section 271.[20] Rather, the complaining CLECs are seeking enforcement of their respective ICAs. That analysis is correct, and is further explained at pages 23-24 of the ALJ's Decision.

B. The ALJ's Decision Correctly Concluded that XO's and Allegiance's Interconnection Agreements Contain Rights Derived from Section 271 of the Federal Act.

SBC next argues that the ALJ's Decision errs in its analysis of the XO and Allegiance ICAs relative to Section 271 issues. While long on SBC policy preferences SBC's arguments are at odds with the plain meaning of language found in XO's and Allegiance's agreements.

Based on interconnection agreement text cited by the Staff and XO and Allegiance, the ALJ's Decision correctly concludes that XO and Allegiance have interconnection agreement rights derived from Section 271 of the federal Act.[21] The

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[18] For example, SBC only issued its Accessible Letter, CLECALL05-039, which sets out a procedure closer to the one contemplated by the FCC in paragraph 234 of the *TRRO after* this Commission's Emergency Order in this proceeding.

[19] SBC Petition for Review at 16.

[20] Staff Rep. Br. At 24.

[21] ALJ Decision at 23-26.

Decision acknowledges that the XO agreement states: "[t]his agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of the [Federal] Act and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Section 251 and 271 that is not specifically provided herein."[22] With respect to the Allegiance agreement, the ALJ Decision acknowledged that the Allegiance agreement states: "SBC Illinois shall have no obligation to provide access to [UNEs] under the terms of the Amended Agreement beyond those required by the [Federal] Act, including effective FCC rules and associated FCC and judicial orders, or other Applicable Law . . . ."[23] That passage, the ALJ Decision correctly concludes, includes SBC's Section 271 obligations.[24] In it's Petition for Review, SBC disputes the ALJ Decision's findings and otherwise makes an improper and untimely reply to XO's and Allegiance's Reply Brief.

1. The ALJ Decision Correctly Concluded that XO's Interconnection Agreement Contains Rights Derived From Section 271 of the Federal Act.

In its Petition for Review, SBC first attacks Section 29.20 of the XO General Terms and Conditions. That section states:

> The terms contained in this Agreement and any Schedules, Exhibits, tariffs and other documents or instruments referred to herein, which are incorporated into this Agreement by this reference, constitute the entire agreement between the Parties with respect to the subject matter hereof, superseding all prior understandings, proposals and other communications,

[22] Id. at 24 (citing XO Ex. 2.5, sub-ex. F, Section 29.20).
[23] Id. at 24-25 (citing XO Ex. 2.5, sub-ex. J, para. 5). As described below, in its Petition for Review, SBC disputes that Allegiance is a party to the XO/SBC TRO Amendment. While Allegiance disagrees, Allegiance has independent 271 authority because its underlying agreement is an opt-in of the McLeod ICA. Therefore, the ALJ Decision's 271 findings at page 25 with respect to McLeod apply equally to Allegiance.
[24] Id. at 25 (citing Staff Rep. Br. at 26.

> oral or written. Specifically, the Parties expressly acknowledge that the rates, terms and conditions of this Agreement shall supersede those existing arrangements of the Parties, if any. This Agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of Act and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Sections 251 and 271 of the Act that is not specifically provided herein. Neither Party shall be bound by any terms additional to or different from those in this Agreement that may appear subsequently in the other Party's form documents, purchase orders, quotations, acknowledgments, invoices or other communications. This Agreement may only be modified by a writing signed by an officer of each Party.

In its Petition for Review (at 20), in an awkward slight of hand, SBC manages to ignore the relevant portion cited by the ALJ's Decision (emphasized in the above quotation). Instead, SBC makes the curious argument that the passage is "an 'exclusivity' provision that excludes obligations from sources outside the contract, rather than creating or incorporating them."[25] However, in reading the complete passage above it becomes clear that the agreement *does not exclude* Sections 251 and 271 of the Act. SBC's position gets stranger. SBC next states: "Rather, the purpose of this section is simply to indicate that the ICA is the exclusive arrangement under which the parties may purchase such 'products and services.'"[26] But again, the passage SBC ignores clearly states that the "products and services" are those "described in Sections 251 and 271." Finally, SBC states: "There is absolutely no basis for reading into section 29.20 a substantive requirement that SBC Illinois provide XO with access to section 271 UNEs for which the FCC has determined that there is no impairment."[27] Of course, SBC's policy position is directly contrary to USTA II, where the Court stated:

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[25] SBC Petition for Review at 20.
[26] Id.
[27] Id.

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§251-252. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching and call-related databases in order to enter the interLATA market.[28]

As the ALJ's Decision states: "It is therefore settled that Sections 271 and 251 of the Federal Act provide independent sources of authority for access to switching, loops and transport. This Commission acknowledged that in the recent XO-SBC Arbitration Order, where it held that 'Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis.'"[29] Thus, each of SBC's objections are contrary to the well-reasoned analysis of the ALJ Decision, recent ICC precedent and the plain meaning of XO's interconnection agreement.

The XO agreement was recently amended to include the TRO Amendment and Attachment that resulted from this Commission's arbitration in Docket 04-0371. SBC devotes the next several pages of its Petition for Review (at pages 21 to 24) to make an improper and untimely reply to XO's and Allegiance's Reply Brief.[30] SBC would have the Commission believe that the TRO Amendment and Attachment somehow turn in SBC's favor, but as shown in the discussion below, that is not the case.

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[28] *United States Telecom Association v. FCC*, 359 F.3d 554, 588 (DC Cir. 2004)("*USTA II*").

[29] ALJ Decision at 23 (citing *XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket 04-0371, Order, Sept. 9, 2004, at 47).

[30] XO and Allegiance request that the arguments contained at pages 21-24 of SBC petition are improper and untimely arguments that should have been made in SBC's case in chief and not in this Petition. XO and Allegiance move that those sections of the SBC's Petition contain arguments that SBC effectively waived and are now inappropriate for this appeal filing and therefore should be stricken .

SBC again leapfrogs Section 1.3.3 of the Attachment to the XO/SBC TRO Amendment[31] to arrive at Section 1.3.3.2 in order to claim that there are only two circumstances where SBC must continue to provide the Status Quo Element: "(1) if the FCC "has *not* promulgated additional or substitute unbundling rules by March 15, 2005" (Id., § 1.3.3.2) and (2) if the FCC "has adopted a rule(s) requiring that such Status Quo Element must be made available under Section 251(c)(3)…"(Id., § 1.3.3.2.1)."[32] The glaring omission that SBC makes is in Section 1.3.3, the precedent to the subsections cited by SBC. Section 1.3.3 states: "Unless otherwise required by Applicable Law, the following Terms and Conditions apply to Status Quo Elements." (emphasis added). "Applicable Law" is defined in the TRO Amendment:

> **"Applicable Law"** means all laws, statutes, common law, regulations, ordinances, codes, rules, guidelines, orders, **and** permits, including those relating to the environment or health and safety, or any Governmental Authority that apply to the Parties or the subject matter of the Agreement or this Amendment.[33]

The above definition clearly includes Section 271 of the federal Act, especially in light of the Commission's Amendatory Arbitration Order in 04-0371, where it stated with Respect to Section 271:

> Language relieving SBC of its obligation to unbundled elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua

[31] See Reply Brief of XO and Allegiance at 18-19. XO's TRO Amendment and the Attachment are in the record as Ex. 2.5, sub-exs. J and K.

[32] SBC Petition for Review at 21-22.

[33] XO-Allegiance Ex. 2.5, sub-ex. J at ¶2.1 (emphasis in original). **"Governmental Authority"** means any federal, state, local, foreign, or international court, government, department, commission, board, bureau, agency, official, or other regulatory, administrative, legislative, or judicial authority with jurisdiction over the subject matter at issue. Id. (emphasis in original).

> 271 UNEs, at prices determined per the criteria Sections 201 . . . of the Federal Act is permissible.[34]

Tucked away at footnote 9 of its Petition for Review, SBC acknowledges in passing the "Applicable Law" elephant in the room. However, SBC can only say that Section 271 was not the "subject matter" of the TRO Amendment.[35] That position is hard to defend, however, given the block quote directly above. Finally, at page 23 of its Petition for Review, SBC seems to argue that the Parties voluntarily left out language on Section 271. That argument is wishful thinking by SBC. This Commission's XO/SBC Amended Arbitration Order in 04-0371 rejected SBC's claim that the parties interconnection agreement cannot require it to abide by its unbundling obligations imposed by Section 271 of the federal Act, stating: "The parties' disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the parties' ICA."[36] Contrary to SBC's argument, those principles, stated in the block quote directly above, were incorporated in the Parties' definition of "Applicable Law".

In its Petition for Review, SBC also ignores other relevant portions of the XO/SBC TRO Amendment. For example, the Parties' *TRO* Amendment states:

> Notwithstanding anything in this Agreement or in any Amendment SBC Illinois shall have no obligation to provide access to unbundled network elements under the terms of the Amended Agreement beyond those required by the Act, including effective FCC rules and associated FCC and

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[34] *Amendatory Arbitration Order* at 48 (emphasis added). Later, the Amendatory Arbitration Order states: "the far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved [by the process of the Amendment to declassify UNEs]." Id. at 49. Thus, Section 271 is clearly "Applicable Law".

[35] SBC Petition for Review at fn. 9.

[36] Amended Arbitration Order in Docket 04-0371 at 48.

> judicial orders, **or other Applicable Law** or where UNEs are not requested for permissible purposes.[37]

The "Applicable Law" language appears again in Paragraph 1.1 of the *TRO* Amendment Attachment, which provides:

> Notwithstanding any other provision of the Agreement, this Amendment, SBC Illinois shall be obligated to provide access to unbundled Network Elements ('UNEs'), combinations of UNEs ('Combinations'), UNEs commingled with wholesale services ('Commingling'), and/or related services to CLEC under the terms of this Amended Agreement only **to the extent required by Applicable Law**.[38]

Finally, Section 1.6 of the *TRO* Amendment Attachment states:

> CLEC reserves the right to argue in any proceeding before the *State Commission*, the FCC or another governmental body of competent jurisdiction that an item not identified in the Agreement or this Amendment as a Network Element (a) is a Network Element under 47 U.S.C. § 251(c)(3), (b) is a Network Element SBC Illinois is required by 47 U.S.C. § 251(c)(3) to provide to CLEC, (c) is a Network Element under, or an item SBC Illinois must otherwise provide pursuant to, 47 U.S.C. 271, (d) is a Network Element under, or an item SBC Illinois must otherwise provide pursuant to, Applicable Law, or (e) is an item that SBC Illinois is required to offer to CLEC at the rates set forth in the Amended Agreement.

2. The ALJ Decision Correctly Concluded that Allegiance's Interconnection Agreement Contains Rights Derived From Section 271 of the Federal Act.

As stated in XO's and Allegiance's Reply Brief, the "Allegiance/SBC agreement (See Exhibit 2.5, Exhibit F) is an opt-in of the original McLeod/SBC agreement. Thus, Staff's analysis for McLeodUSA and Allegiance should be consistent."[39] Likewise, the ALJ's Decision with respect to Section 271 and the McLeod ICA is applicable to

[37] See Exhibit 2.5, Exhibit J (XO/SBC TRO Amendment at ¶5) (emphasis added).
[38] See Exhibit 2.5, Exhibit K (XO/SBC TRO Amendment Attachment at ¶1.1 (emphasis added).
[39] XO's and Allegiance's Reply Brief at 15.

Allegiance.[40] The ALJ's Decision finds that CLECs can assert Section 271 rights pursuant to the McLeod agreement:

> [the] provision of UNEs identified in this Agreement is subject to the provisions of the Federal Act, including, *but not limited to*, Section 251(d). There is also an exclusivity provision in the ICA, which confines McLeod to obtaining Section 271 UNEs through their respective contract. Therefore, McLeod's right to Section 271 UNEs is grounded in, and can be enforced through, its ICA.[41]

As noted above, SBC disputes whether the TRO Amendment that resulted from the Arbitration in Docket 04-0371 applies to Allegiance.[42] The TRO Amendment is fully applicable to Allegiance. Allegiance and SBC have signed a name change amendment, and the Parties will terminate the Allegiance agreement soon. Allegiance notes that this is a new issue not raised by SBC during the hearings. Thus it is unable to present evidence of the status of negotiations or copies of documents demonstrating the status of Allegiance.

VII. VIOLATED SECTION 13-514 OF THE ILLINOIS PUBLIC UTILITIES ACT.

In part, the ALJ's Decision found that SBC's Accessible Letters contravened XO's and Allegiance's UNE rights under Section 271 of the Federal Act and Section 13-801 of the PUA. Additionally, prior to the Commission's Emergency Order, the ALJ's Decision noted that SBC's Accessible Letters failed to implement the TRRO's self certification procedures for loops and transport. Finally, the ALJ's Decision found that SBC's Accessible Letters denied additional services and service modifications to CLECs'

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[40] As discussed below, the TRO Amendment (XO-Allegiance Ex. 2.5, sub-ex. F) is equally applicable to Allegiance.

[41] ALJ Decision at 29 (internal footnotes omitted) (emphasis in original).

[42] See footnotes 8 and 10 of SBC's Petition for Review.

embedded base customers. With these findings, the ALJ's Decision correctly concluded that SBC violated sections of 13-514 of the PUA, including subsections (2), (6), (8), (10), (11) and (12).

A. 220 ILCS 5/13-514(2)

The ALJ's Decision holds that SBC impaired the speed, quality and efficiency of CLEC services utilizing ULS and unbundled loops and transport, by issuing Accessible Letters that: "disregarded unbundling duties under Section 271 of the Federal 271 of the Federal Act and Section 13-801 of the PUA."[43]

In its Petition for Review (at 39), SBC attempts to distinguish services "used" from services "provided". However, that distinction is not persuasive. As the ALJ's Decision noted: "when services provided directly to the public are made slower, less attractive or more expensive to the CLEC, revenue is lost or profit shrinks. . . it would be unconstructively naïve – to construe speed, quality and efficiency apart from this competitive context.

B. 220 ILCS 5/13-514(6)

The ALJ's Decision found that it was unreasonable for SBC to issue Accessible Letters that:

> disregarded the unbundling duties under Section 271 of the Federal Act and Section 13-801 of the PUA; failed, initially, to implement the TRRO self-certification option; increased billed amounts rather than awaiting true-p; determined non-impaired wire centers without negotiation; and refused, without negotiation, to fulfill move, migration and add orders for embedded customers. Moreover, by acting unilaterally, when the TRRO explicitly mandated negotiation, and by ignoring substantive law provisions in orders of the Commission and the FCC . . . SBC was unreasonable[44]

[43] ALJ Decision at 33-34.
[44] ALJ Decision at 35.

In its Petition for Review, SBC first argues that its actions did not have an "substantial adverse impact" on CLECs. That argument, however, cannot stand up to the facts listed in the ALJ's Decision. As stated before, SBC unilaterally issued Accessible Letters, contrary to the TRO and interconnection agreements, that contained one-sided interpretations of SBC's obligations (including SBC's initial failure to provide for self-certification procedures for loops and transport). Those actions satisfy subsection (6) of 13-514.

Second (at 41), SBC reargued its position that its interpretation of the TRO Remand Order was "at least reasonable". That argument is a red herring. Beyond being unreasonable, SBC is not allowed to unilaterally foist its interpretation of its obligations upon all Illinois CLECs by issuing Accessible Letters. That action was contrary to the TRO and the XO and Allegiance agreements.

C. 220 ILCS 5/13-514(8)

The ALJ's Decision held, in part, that XO, Allegiance (and McLeod[45]) have the right of access, under the terms of their respective ICAs, to UNEs under Section 271 of the Federal Act.[46] Similarly, this Decision held, that XO and Allegiance (and McLeod) have rights of access under the terms of their respective ICAs, to UNEs under Section 13-801 of the PUA.[47] The ALJ's Decision held that SBC's Accessible Letters violated those terms by purporting to withhold the relevant UNEs generally, not merely pursuant to

[45] As noted above, Allegiance is a party to the McLeod ICA.
[46] ALJ Decision at 35.
[47] Id.

Section 251.[48] Furthermore, the ALJ's Decision found that to the extent that SBC acted unilaterally and without negotiation through the Accessible Letters, in contravention of each CLEC's present ICA rights to the relevant UNEs under Section 251 of the Federal Act, SBC violated subsection 13-514(8).[49]

In its Petition for Review, SBC reargues its earlier positions that it did not violate ICAs and its actions were not unreasonable. Those positions, however, do not survive scrutiny. Fort the reasons stated in the ALJ's Decision, and as argued above, SBC violated subsection 13-514(8).

D. 220 ILCS 5/13-514(10)

In part, the ALJ's Decision finds that XO, Allegiance (and McLeod) have the right of access, under the terms of their respective ICAs, to UNEs under Section 271 of the Federal Act. As noted by the ALJ's Decision, the TRO makes this clear, and nothing in the TRRO changes those rights. Further, the ALJ's Decision noted that Section 13-801, as interpreted by the Commission, imposes unbundling obligations on SBC that are independent of SBC's unbundling duties under Section 251 of the Federal Act. The 2002 Order in Docket 01-0614 described those duties and the 01-0614 adjusted them. XO, Allegiance (and McLeod) have negotiated the right to obtain Section 13-801 UNEs through their ICAs. The ALJ Decision correctly concluded that it was unreasonable of SBC, in its Accessible Letters, to ignore those Commission and FCC requirements. The ALJ's Decision correctly concluded that SBC was aware of those orders and rules, and of

[48] Id.
[49] Id.

the contents of its own ICAs, and lacked a reasonable basis for purporting to abandon those duties, without negotiations, through its unilateral Accessible Letters.

In its Petition for Review, SBC states that XO and Allegiance made no claim under subsection 13-514(10). It therefore asserts that the ALJ's Decision is erroneous in this regard. SBC is wrong. The ALJ has determined that SBC's actions were an impediment to competition pursuant to Section 13-514. Section 13-514 lists "per se" violations, but also makes clear that "however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited." In its Complaint, XO and Allegiance alleged that SBC has violated 13-514. As the ALJ's Decision found, SBC did violate 13-514.

E. 220 ILCS 5/13-514(11)

The ALJ's Decision correctly concluded that Section 13-801 imposes unbundling obligations on SBC that are independent of SBC's duties under Section 251. Because XO, Allegiance (and McLeod) have the right to Section 13-801 UNEs pursuant to their ICAs, SBC's attempt to deny those elements through its Accessible Letters violated Section 13-801.

In its Petition for Review, SBC again states that it should be excused because of its "commitments". For the reasons stated in the ALJ's Order and in this Reply, SBC's "commitments" were hollow and untimely and therefore insufficient to excuse SBC's conduct.

F. 220 ILCS 5/13-514(12)

The ALJ's Decision found that SBC's Accessible Letters violated the Commission's Order implementing Section 13-801 in Docket 01-0614. For the reasons stated in Subsection (11) above, and within this Reply, that conclusion is correct.

VIII. CONCLUSION

For the reasons stated above, the Commission should deny SBC's Petition for Review of the Administrative Law Judge's Decision.

Dated: May 18, 2005

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the REPLY OF XO ILLINOIS, INC. AND ALLEGIANCE TELECOM, INC. TO SBC'S PETITION FOR REVIEW OF THE ADMINISTRATIVE LAW JUDGE'S DECISION has been served upon the parties listed on the attached service list on May 18, 2005, by electronic mail.

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